Dispute Settlement in Trade Relations

QUESTIONS AND ANSWERS

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How are the rights of private parties protected in international trade agreements?

International agreements traditionally provide for the protection of the rights of State Parties. How do private parties deal with the fact that, traditionally, they do not have standing before international courts? They can request their states of nationality to act on their behalf and litigate in international dispute settlement bodies (as many WTO Members do) and to afford them diplomatic protection. However, diplomatic protection is not an enforceable right.

Some of the rights and interest of private parties can be protected in the special case of trade remedies (anti-dumping and countervailing measures) and safeguards. This happens through the principles and procedures of the WTO's Anti-Dumping Agreement, Subsidies and Countervailing Measures Agreement, and the Safeguards Agreement. Affected private parties are entitled to be heard when requests for trade remedies and safeguards are investigated, and they may lodge review applications before domestic courts or tribunals. Multilateral, regional and national legal disciplines apply to such investigations. However, African states do not, as a rule, provide for domestic trade remedy investigations and proceedings. (Only South Africa and Egypt have WTO compatible national trade remedy regimes in place.) This leaves most African firms at a disadvantage.

The AfCFTA Protocol on Trade in Goods contains detailed provisions on trade remedies, global as well as preferential safeguards. Annex 9 to this Protocol and a detailed set of Guidelines spell out how these remedies must be implemented. It will be a major breakthrough if the proposed arrangements result in effective protection for private parties trading across African borders. This area merits further monitoring.

How is dispute settlement provided for in Africa's regional economic communities?

When regional integration has grown to the point where effective supra-national institutions (including regional courts and tribunals) have been established and *community law* has been developed, private

parties (including legal persons) are granted *locus standi* rights and special remedies, as happens in the European Union. African regional integration has not developed to this level. African States are protective of their **sovereignty**. And they do not litigate against each other over trade issues. It means African governments will not act on behalf of private parties (under their jurisdiction) and pursue claims against other State Parties about unlawful trade measures.

Zimbabwe's violations over the last number of years of its obligations under the SADC and COMESA Trade Protocols are cases in point. The Zimbabwean surcharges and additional taxes on imported goods did not result in any disputes being declared by affected trading partners. Zimbabwe has a new government and hopefully the rule of law will be respected. Zimbabwe's policies and measures should be monitored.

Some of the **Regional Economic Communities** (RECs) have established their own courts or tribunals. In the East African Community (EAC) and in the Common Market for Eastern and Southern Africa (COMESA) the respective Courts of Justice have rendered rulings in applications brought by private parties; provided domestic remedies have been exhausted. These applications are mostly about complaints by officials working in regional secretariats and institutions, or the violation of basic human rights, not REC law. The only milestone judgment involving the rights of a private party in the context of trade liberalization, was the ***Polytol* case**, discussed in detail in earlier tralac publications.[1]

What happened to the SADC Tribunal?

Effective dispute settlement obviously depends on the existence of independent courts and tribunals. The fate of the **SADC Tribunal** needs to be recounted. This saga demonstrates that the battle for impartial and independent dispute settlement as part of regional integration in Africa, has not been won. SADC was designed with high expectations for rules-based governance. The SADC Treaty speaks of common action; regional policies, respect for the rule of law, human rights and democracy. The Member States undertook to take all steps necessary to ensure the uniform application of the Treaty and to accord it the force of national law.[2]

In 2005 the SADC Tribunal became operational. Its task was to ensure respect for the SADC Treaty and all the subsidiary legal instruments, and to adjudicate disputes referred to it. This Tribunal could render final and binding judgements. It heard about 15 applications bought by private parties, the majority by SADC officials. There were no cases about regional integration or trade. When, in the **Campbell Case** the SADC Tribunal ruled against Zimbabwe for expropriating private land without compensation, the SADC leaders decided, at an Extraordinary Summit in May 2011, to suspend the Tribunal. There have been subsequent efforts to establish a new SADC Tribunal. At the SADC Summit of August 2014, a new Protocol was adopted and signed; providing for a second Tribunal with jurisdiction over inter-state

[1] See, for example, https://www.tralac.org/publications/article/7604-the-polytol-judgment-of-the-comesa-court-of-justice-implications-for-rules-based-regional-integration.html
[2] Art 6 SADC Treaty.

disputes only. This Protocol has not been ratified and has not entered into force. SADC is without a Tribunal.

Is it possible for a private party to bring a trade-related case to a domestic court?

Private litigants have begun to approach domestic courts directly when in need of protection as importers/exporters and international service providers.

National Administrative Law remedies are available to private parties, in matters involving executive action (e.g. the issuing of permits) and in respect of service providers falling under the jurisdiction of national regulators. The ruling in the South African case of *Borbet and others v The National Energy Regulator of South Africa* is a case in point. It has been analysed in an earlier tralac Discussion.[3]

There have been other interesting developments too. In Namibia and in South Africa private companies are approaching domestic courts for relief in terms of provisions in trade agreements. They argue that these agreements should find application as part of the law of the land. However, this avenue is only available in those jurisdictions where the national Constitution so allows. This is not yet a firmly settled area. There are outstanding questions about the extent of judicial review with regard to public policy issues, as well as separation of powers questions. In countries following a strict dualist tradition, unincorporated international agreements cannot be invoked before domestic courts. This has been ruled to be the case in inter alia Botswana and Mauritius.

What does the AfCFTA provide for in terms of dispute settlement?

The African Continental Free Trade Area (AfCFTA) has recently been launched with high levels of ambition about how it will boost rules-based intra-African trade. One of the Protocols adopted in March at the Extraordinary Summit of the African Union in Kigali, deals with dispute settlement in the AfCFTA. These will, of course, only become available once this Agreement and its Protocols have entered into force. We have a blog on the provisions of this Protocol.[4]

The AfCFTA dispute settlement system will only involve disputes between state parties. Private parties (producers, exporters, importers, consumers or workers) do not have standing, they will have to rely on diplomatic protection. That is, AfCFTA state parties will act on behalf of their private parties against violations of the AfCFTA by another state party.

Third parties with substantial interest in the dispute may be afforded an opportunity to participate in the dispute settlement proceedings as – *amicus curiae* – a friend of court.

[3] See https://www.tralac.org/discussions/article/10471-checking-the-cost-of-trade-electricity-tariffs-in-south-africa-under-judicial-scrutiny.html

[4] 'The Dispute Settlement Mechanism under the African Continental Free Trade Area'. tralacBlog, 1 October 2018. https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html

What are the AfCFTA procedures for dispute settlement?

When a dispute arises, the disputing state parties shall endeavour to reach an amicable solution or settle the dispute through consultations. The request for consultation must be notified in writing to the Dispute Settlement Body (AfCFTA DSB).

State parties to a dispute may any time voluntarily undertake good offices, conciliation or mediation to settle the dispute. Disputing parties may also mutually agree to settle their dispute through arbitration. They shall abide by the arbitration and the award shall be notified to the AfCFTA DSB for enforcement.

If informal dispute settlement is not successful, the complaining party may refer the matter to the AfCFTA DSB, which will then establish a Panel to determine the matter. If there are 2 disputing parties, there will be 3 Panellists; where there are more than 2 disputing parties, there will be 5 Panellists. The Panel must examine the case and make its findings in the form of a report. The Panel report will be considered and reviewed by disputing parties. The report will be submitted to the AfCFTA DSB, to make recommendations or give rulings provided in the AfCFTA. Any state party to the dispute may review and object the Panel report then notifies the AfCFTA DSB of its decision to appeal, if it so wishes. In that case, the Panel report will not be adopted.

Then the AfCFTA DSB establishes an Appellate Body to hear the appeal from the panel cases.

Appeals are only based on legal issues i.e. issues of law covered in the Panel reports and legal interpretations developed by the Panel. On appeal, the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the Panel. The Appellate Body's findings are submitted in form of a report to the AfCFTA DSB.

What is the applicable law in the AFCTA dispute settlement system?

The AfCFTA and its legal instruments will be the primary applicable law in dispute settlement under the AfCFTA. In the interpretation of these legal instruments, the Panel and the Appellate Body shall use customary international law i.e. customary rules of interpretation of public international law, including the Vienna Convention on the Law of Treaties.

How will the Panel or Appellate Body rulings be recognised and enforced?

The AfCFTA DSB adopts and implements the rulings of the Panel and Appellate Body. It is the duty of state parties to promptly comply with the recommendations and rulings of the AfCFTA. State party complained against informs the AfCFTA DSB of its intentions concerning the implementation of the recommendations and rulings of the DSB. If the state party finds it impossible to immediately comply with the AfCFTA DSB recommendations and rulings, it shall be granted a reasonable period to comply provided the AfCFTA DSB approves. The AfCFTA DSB will monitor the implementation of adopted recommendations or rulings by the concerned State Party.

What are the available legal remedies in AfCFTA dispute settlement system?

If the Panel or the Appellate Body concludes that a measure complained of (adopted by a state party) is inconsistent with the AfCFTA, the state party will be asked to bring the measure into conformity with the AfCFTA. The Panel or the Appellate Body may suggest ways in which the state party complained against could implement the recommendations.

Compensation and suspension of concessions or other obligations are temporary measures available to the aggrieved party if the AfCFTA DSB recommendations or rulings are not implemented within a reasonable period. Compensation is voluntary and, if so granted, must be consistent with the provisions of the AfCFTA.

Suspension of concessions or other obligations are temporary and must be consistent with the AfCFTA. These remedies are available until a time stipulated by the AfCFTA, the breach/violation determined is removed or if the state party complained against decides to implement the DSB recommendations or provides a solution to the injury caused by delayed or non-compliance. The remedies can be removed if a mutual solution is reached by disputing parties.

What is the role of the AfCFTA Secretariat in dispute settlement?

The AfCFTA Secretariat facilitates the constitution of Panels, and assists Panels on legal, historical and procedural aspects of the matter dealt with. It keeps the AfCFTA DSB informed of the status of the implementation of the decisions made under the Protocol on Dispute Settlement.

The AfCFTA Secretariat will provide legal advice and assistance to state parties in respect of dispute settlement. The AfCFTA Secretariat may organise special training courses concerning dispute settlement procedures and practices for state parties to develop expert capacity on dispute settlement mechanism. All the notifications to and from DSB and state parties will be made through the AfCFTA Secretariat.